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DISQUALIFICATION OF THE TESTIFYING ADVOCATE—A FIRM RULE?

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In 1978, the California Supreme Court in *Comden v. Superior Court*¹ disqualified Loeb & Loeb, a seventy-five member Los Angeles law firm, from representing plaintiff in a litigation matter because the trial court concluded it could not say with any security that Marvin Greene, a member of Loeb & Loeb, would not be called as a witness in the trial.² The supreme court decision was the high point of a legal battle that continued even after the disqualification of Loeb & Loeb. When the skirmish on legal ethics finally ended (if it has ended),³ the attorneys for both plaintiffs and defendants were disqualified on the same ground: that a member of their firm ought to be a witness in the trial of the matter.

The disqualification of counsel for both sides in *Comden* naturally raises, if not forces, the question of the utility and practicality of the rule of ethics that resulted in the disqualifications. Even without the disqualifications of counsel for both sides, the necessity of disqualifying an entire firm because one member of the firm, who will not be trial counsel, may be a witness is questionable. Indeed, it is instructive that

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We would like to thank the following lawyers involved in the *Comden* case: Mr. Harold Friedman and Mr. Peter Niemiec of Loeb & Loeb; Mr. Richard Agay of Cooper, Epstein & Hurewitz; and Mr. David Stuber of Paul, Hastings, Janofsky & Walker, who gave us the benefit of his observations shortly after that firm was substituted in place of Loeb & Loeb.

We would also like to thank Mr. Ron Stovitz, one of the attorneys for the State Bar of California, who supplied us with the amicus curiae brief of the State Bar and advised us of the action taken by the State Bar Board of Governors to amend the California rule; and Mr. Paul Devin of Peabody & Arnold (Boston, Mass.), who compiled a list of advisory opinions of bar association committees on this subject.

1. 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9, *cert. denied*, 99 S. Ct. 568 (1978).

2. Other members of Loeb & Loeb were also potential witnesses, but the supreme court attached less significance to their roles as witnesses. *Id.* at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.

3. Loeb & Loeb's petition for certiorari to the United States Supreme Court has been denied. 99 S. Ct. 568 (1978).

State Bar Associations of California,⁴ New York and Connecticut⁵ have submitted briefs against such disqualifications.

This article will examine the rule that underlies such disqualifications, as it is presently written and enforced, and will examine the potential impact of the rule within and without the litigation context.⁶ We are, at the least, skeptical whether the rule serves any legitimate purpose. More important, we are convinced that the rule purposelessly interferes with the lawyer-client relationship and inhibits legitimate action by counsel both in the planning and preventive stages when the transaction is taking place, and throughout the litigation process. The rule unnecessarily complicates counsel's decision in representing a client, since a thoughtful attorney now has to keep in mind that as a result of any action he⁷ might take he could become a percipient witness and thus disqualify his firm from further representing his client in litigation. In response, the lawyer may refrain from taking otherwise appropriate action in order to protect the lawyer-client relationship, or may jeopardize the relationship that both lawyer and client have nurtured, or both.

I. THE LAW

Although the court in *Comden* applied a statute unique to California,⁸ that statute is derived from and is almost identical to two disciplinary rules contained in the ABA Code of Professional Responsibility, which was promulgated in 1969⁹ and became effective in 1970. Since 1970, the ABA Code has been adopted in all states and has also been adopted as the local rules of court in several federal districts. Even where not adopted, the Code may serve as a guide to trial judges in controlling the conduct of attorneys in their courtrooms.¹⁰

4. State Bar of California Brief as Amicus Curiae, *Comden v. Superior Court*, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9, cert. denied, 99 S. Ct. 568 (1978).

5. New York State Bar Association Brief as Amicus Curiae, *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975); Connecticut Bar Association Brief as Amicus Curiae, *id.*

6. We will not, however, examine the rule as it applied to the trial counsel-witness, *i.e.*, the lawyer who will appear in one matter before judge or jury both as lawyer and witness.

7. For simplicity, we have chosen the masculine gender when referring to counsel and clients.

8. Rules of Professional Conduct of the State Bar of California, rule 2-111(A)(4), CAL. BUS. & PROF. CODE foll. § 6076 (West Cum. Supp. 1979).

9. DR 5-101(B), -102; see *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975).

10. *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1351 (D. Colo. 1976); *Stanwick Corp. v. United States*, No. 77-115 (U.S. Ct. Cl., filed July 14, 1978).

The disciplinary rules of the ABA Code define those circumstances in which a lawyer may accept employment or may continue employment when he learns that he or a member of his firm ought to be called as a witness on behalf of his client or other than on behalf of his client.

DR 5-101

. . . .

- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.¹¹

DR 5-102

. . . .

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.¹²

11. DR 5-101(B).

12. DR 5-102.

The disciplinary rules are not the only section of the Code of Professional Responsibility, but they are the most influential because they "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."¹³ They have been drafted to be enacted as law in various states and to be enforced by enforcing agencies, although the Code gives no indication of the role such agencies should play.¹⁴

The Code also contains ethical considerations that are "aspirational in character and represent the objectives toward which every member of the profession should strive."¹⁵ The ethical considerations "constitute a body of principles upon which the lawyers [and courts] can rely for guidance in many specific situations."¹⁶ The ethical consideration concerning an attorney's accepting or continuing employment when a member of the attorney's firm is a potential witness provides, in part:

Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. *In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.*¹⁷

Thus the ethical considerations, like the disciplinary rules, take a

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble.

14. *Id.*

15. *Id.*

16. *Id.*; see *Connell v. Clairol, Inc.*, 440 F. Supp. 17 (N.D. Ga. 1977); *Miller Elec. Constr., Inc. v. Devine Lighting Co.*, 421 F. Supp. 1020, 1023 (W.D. Pa. 1976); *Comden v. Superior Court*, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9, *cert. denied*, 99 S. Ct. 568 (1978).

17. EC 5-10 (footnotes omitted) (emphasis added).

hard line by favoring withdrawal unless the client suffers an *unreasonable* hardship thereby. At the same time, however, the ethical considerations speak of an attorney's weighing factors, including the materiality of testimony and the effectiveness of his representation, before making the determination to resign. The disciplinary rules do not afford the lawyer even the luxury of subjective considerations to cushion later arguments.¹⁸ Rather, the disciplinary rules appear to objectify the lawyer's dilemma, which makes it even easier for a court to order disqualification.

Although enforcement of disciplinary rules 5-101(B) and 5-102 has not been uniform from one jurisdiction to the next, the courts have predominantly taken a strict approach.¹⁹ No court has adopted the approach suggested by the dissent in *Comden* that the withdrawal rule should be enforced only in bar disciplinary hearings rather than in the context of ongoing litigation.²⁰ Nor has any court held that a client has

18. This is the reverse of what it should be. The disciplinary rules, since they state a minimum level of conduct, are intended to be easier to comply with than the ethical considerations, which are aspirational; but in this instance, a lawyer might meet the standards in the ethical considerations while failing to comply with the disciplinary rules.

19. See, e.g., *Connell v. Clairol, Inc.*, 440 F. Supp. 17 (N.D. Ga. 1977). The courts are noticeably more lenient in applying DR 5-102(B) than DR 5-101(B) or DR 5-102(A). Disciplinary rule 5-102(B) applies when a lawyer or firm member may be called as a witness *other* than on behalf of his client. In such circumstances, the firm need not resign "until it is apparent that his testimony is or may be prejudicial to his client." DR 5-102(B); see, e.g., *Kroungold v. Triester*, 521 F.2d 763 (3d Cir. 1975); *Freeman v. Kulicke & Soffa Indus., Inc.*, 449 F. Supp. 974 (E.D. Pa. 1978); *Ross v. Great Atl. & Pac. Tea Co.*, 447 F. Supp. 406 (S.D.N.Y. 1978). The genesis of this distinction is clear. Neither the current rule nor its predecessor, which applied only to the trial lawyer who is a witness, was intended to allow counsel to disqualify opposing counsel by calling him as a witness. See *Galarowicz v. Ward*, 119 Utah 611, 620, 230 P.2d 576, 580 (1951), cited in ABA CODE OF PROFESSIONAL RESPONSIBILITY, canon 5 n.31. But in spite of its surface appeal, the distinction makes little sense. If an attorney ought to testify, the rationale for disqualifying his firm is equally applicable whether the testimony is on behalf of or contrary to the interests of his client. The real question when trial counsel calls his opponent is whether calling opposing counsel is warranted or is a tactical maneuver aimed at disqualification. Although this must be kept in mind in interpreting the disciplinary rules and the judicial constructions thereof, it is largely peripheral to the interests of this article. From this point forward we will ignore this distinction and concentrate on those cases in which the more common question, whether the attorney ought to testify on behalf of his client, is raised. Unless otherwise distinguished, the withdrawal requirement in disciplinary rules 5-101(B) and 5-102 will hereinafter be referred to as the "withdrawal rule."

20. 20 Cal. 3d at 918, 576 P.2d at 977, 145 Cal. Rptr. at 15 (Manuel, J., dissenting). Ironically, at least one court has said that the enforcement of the withdrawal rule by the court is not for the purpose "of obtaining an adjudication as to what constitutes professional misconduct on the part of an attorney, nor . . . for the purpose of laying down guide rules for the future conduct of an attorney on the speculation of what may develop during the litigation." *Tru-Bite Labs, Inc. v. Ashina*, 54 App. Div. 2d 345, 388 N.Y.S.2d 279 (1976).

the right to waive the enforcement of the rule.²¹ Rather, while the client's opinion has been suggested as a factor to be considered,²² the prevalent position is that although these disciplinary rules are for the protection of clients, they are also for the protection of the bar and the integrity of the court, and therefore may not be waived by the client.²³

The crucial question in determining whether the withdrawal rule applies in any situation is, when "ought" a lawyer testify at trial²⁴ on behalf of his client? Until it is determined that a lawyer ought to testify, his firm need not be disqualified.²⁵ The question, then, is not whether the attorney *will* be called, but whether he *ought* to be called, either in the case in chief or in rebuttal.²⁶ This, strangely, implies that in some instances a firm would be disqualified when a member ought to testify, even if it were clear that the member would not testify, and conversely, that a firm would not be disqualified when a lawyer would in fact testify even though he ought not.²⁷ There is a reason behind this

21. In *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975), however, the court applied DR 5-101(B) and DR 5-102 by refusing to allow the testimony of the attorney rather than requiring disqualification of the attorney. This is, in effect, a waiver with a hook—that the client loses testimony he ought to have. See also *Jones v. South Dakota Children's Home Soc'y*, __ S.D. __, 238 N.W.2d 677 (1976).

22. *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975) (Gurfein, J., concurring); *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1354 (D. Colo. 1976). See also ILLINOIS STATE BAR ASS'N, PROFESSIONAL ETHICS OPINION NO. 389 (1972); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 339 (1975).

23. *Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064, 1068 (N.D. Tex. 1977); OREGON STATE BAR ASS'N COMM. ON LEGAL ETHICS, OPINIONS, No. 386 (1975). For this reason, they can be raised by the court on its own motion, 441 F. Supp. at 1067, and cannot be waived by opposing counsel, COUNCIL OF THE NORTH CAROLINA STATE BAR, ETHICS OPINIONS, CPR 62 (1975).

24. No case has interpreted the meaning of trial, or what it means to testify at trial. It is unclear whether testimony at trial includes a hearing on a preliminary injunction, as in *Comden*, or other instances when written and oral testimony is taken. The closest any case has come is deciding that a pretrial hearing in a criminal case is not a trial for purposes of the withdrawal rule. *People v. Superior Court*, 84 Cal. App. 3d 491, 502, 148 Cal. Rptr. 704, 711 (1978). But see *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978) (grand jury constitutes "trial").

The Illinois State Bar Association has opined that an affidavit offered in lieu of testimony would be testimony under the withdrawal rule. ILLINOIS STATE BAR ASS'N, PROFESSIONAL ETHICS OPINION NO. 540 (1977).

25. The question under DR 5-102(B) is whether the lawyer "may be called as a witness" rather than whether he "ought to testify," but this is coupled with the question whether the lawyer's testimony will be prejudicial to his client.

26. See *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975); *Norman Norrell, Inc. v. Federated Dep't Stores, Inc.*, 450 F. Supp. 127 (S.D.N.Y. 1978).

27. See *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486 (S.D.N.Y. 1976). See also *Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 538 n.21 (3d Cir. 1976) (arguing, perhaps only for sake of argument, that DR 5-101 and DR 5-102 do not apply to expert witnesses, since they cannot be characterized as witnesses who ought to testify).

strange approach, for the court is in the unlikely position of determining, as a lawyer, when a particular person ought to be a witness. Leaving this question in the hands of the trial counsel, who would normally determine who ought to be a witness, would allow the client, or the lawyer, to avoid the ethical question entirely by not calling counsel's colleague.²⁸

Since the court is not always in a position to determine accurately who actually ought to be called as a witness, courts have applied different standards and approaches to the problem. One approach is to describe generally the factors involved in loose, but loaded, prose. For example, the court in *Comden* discussed the issue as follows:²⁹

We deem the rule to require that the court first consider whether the attorney's testimony will be necessary to protect his client's interest and, if it concluded such testimony will likely be necessary, that it order a timely withdrawal consistent with minimizing prejudices which may result from the substitution of counsel. Whether an attorney ought to testify ordinarily is a discretionary determination based on the court's considered evaluation of all pertinent factors including, inter alia, the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established.³⁰

This passage slithers from the question whether the attorney's "testimony will be necessary" to whether the testimony "will likely be necessary" to whether the attorney "ought to testify" under the circumstances. The court views the last question in terms only of the import of the testimony on establishing a matter, and of the import of this to the client's position in the trial. Thus, the context of the trial court's determination is purely the matter before it—presumably, at least, it would be inappropriate for the trial court to determine that a lawyer ought not testify in the matter before it, although the lawyer's testimony might be helpful and relevant, because that testimony would be damaging to the client in other ways.

As the broad stroke of the prose foreshadows, the court in *Comden* left the path clear for a trial court to disqualify trial counsel's firm by

28. The lawyer would still have the obligation, of course, to act competently.

29. It first gave the dictionary definition of "ought" in a footnote, as "'used to express moral obligation, duty, or necessity . . . or what is correct, advisable, or expedient.'" 20 Cal. 3d at 913 n.2, 576 P.2d at 974 n.2, 145 Cal. Rptr. at 12 n.2 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1599 (1961)). This lent no light to the question.

30. *Id.* at 913, 576 P.2d at 974, 145 Cal. Rptr. at 12.

vesting the trial court with "broad discretion to order withdrawal."³¹ More specifically, the court held that it would not grant petitioner's writ of mandamus unless the facts commanded that the trial court's discretion could be exercised in but one way.³²

The court did not discuss when the facts would require that a trial court's discretion be exercised only one way, but the weakness of the motion to disqualify that was upheld in *Comden* is instructive. All of the facts witnessed by attorney Marvin Greene of Loeb & Loeb were witnessed by others. The most important piece of evidence to which Greene could testify was the hearsay statement by Anthony Strammiello that he owned a fifty percent equity interest in the stock of Doris Day Distributing Corporation, for which he paid \$150,000. Others present at the meeting also reported hearing this statement, although Strammiello denied making it.³³ Even if the crucial question were (and it was not) whether Mr. Strammiello made the statement rather than whether he owned the stock, it was certainly questionable (before depositions of others present at the meetings had been taken) whether Mr. Greene's testimony would be needed or even helpful. Loeb & Loeb posited that Mr. Greene's testimony would be unnecessary and offered to withdraw if discovery failed to rule out the usefulness of Greene's testimony.³⁴ Faced with the questionable need for Greene's testimony, the trial judge concluded not that Greene ought to testify, but merely that he could not "say with any degree of security or in good conscience that Mr. Greene will not be called as a witness."³⁵ That, probably, was (and is) true of anyone, and certainly of every lawyer involved in the case. The California Supreme Court's finding of no abuse of discretion by the trial court leaves little if any reason for restraint by trial judges.

Other courts have given slightly more guidance on the questions of when a lawyer "ought to testify" and when during the proceeding that question should be determined. At one extreme is the position, recalling the ethical considerations, that every doubt should be resolved in favor of the attorney's testifying, and consequently in favor of disqualification. Under this approach, "[t]he client is entitled to every

31. *Id.* at 916, 576 P.2d at 975, 145 Cal. Rptr. at 13.

32. *Id.* at 913, 576 P.2d at 974, 145 Cal. Rptr. at 12.

33. *Id.*

34. *Id.* at 913, 576 P.2d at 973, 145 Cal. Rptr. at 11.

35. *Id.* (quoting trial court).

scrap of favorable evidence that is available, not only favorable evidence that is *essential* to his case."³⁶ The potential testimony of any attorney-witness with material evidence, whether or not it is duplicative of other testimony, and no matter how far before trial, subjects the attorney and his firm to the withdrawal rule. Thus, one court required each attorney with a case on its docket to notify the court as soon "as it appeared that he or any member of his firm has any testimony that *could conceivably* be used at trial."³⁷

A more moderate position is that the testimony of the lawyer or member of his firm that may be prejudicial to a client need not be absolutely crucial for a disqualification motion to be granted, but neither can it be so insignificant that it raises suspicion that the motion is a tactical artifice or that there is no violation of the policy of the underlying canon.³⁸ This approach leads a court to examine whether the testimony of plaintiff's attorney is genuinely *needed*, rather than just helpful.³⁹ Similarly, it may lead a trial court to delay decision in appropriate circumstances to determine whether the attorney or some other witness should testify.⁴⁰

Yet since the determination whether an attorney's testimony is necessary must be considered on a case-by-case basis, this standard offers little more guidance than did the court in *Comden*.⁴¹ This is particularly true since delaying a decision on disqualification may increase the impact of disqualification if later required.⁴² Since each trial court may apply its own standards (and is left free to do so by the appellate decisions), even if a trial counsel has in good faith determined that no member of his firm will or ought to testify, application of the rule is always possible. As a result, motions to disqualify will remain a vital tactical weapon.⁴³

36. *Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064, 1068 (N.D. Tex. 1977) (emphasis in original).

37. *Id.* at 1069 (emphasis in original).

38. *See Freeman v. Kulicke & Soffa Indus., Inc.*, 449 F. Supp. 974, 978 (E.D. Pa. 1978) (applying DR 5-102(B) (which may explain why the position is more moderate)).

39. *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975); *Connell v. Clairrol, Inc.*, 440 F. Supp. 17, 18 n.1 (N.D. Ga. 1977).

40. *Miller Elec. Constr., Inc. v. Devine Lighting Co.*, 421 F. Supp. 1020, 1023 (W.D. Pa. 1976).

41. *Norman Norrell, Inc. v. Federated Dep't Stores, Inc.*, 450 F. Supp. 127 (S.D.N.Y. 1978), provides an excellent example of one analysis of the import of an attorney's potential testimony.

42. *Compare Miller Elec. Constr., Inc. v. Devine Lighting Co.*, 421 F. Supp. 1020, 1023 (W.D. Pa. 1976), with *Comden v. Superior Court*, 20 Cal. 3d at 913-14, 576 P.2d at 974, 145 Cal. Rptr. at 12. But see *Norman Norrell, Inc. v. Federated Dep't Stores, Inc.*, 450 F. Supp. 127 (S.D.N.Y. 1978) (delaying disqualification until trial).

43. *See Freeman v. Kulicke & Soffa Indus., Inc.*, 449 F. Supp. 974, 977-78 (E.D. Pa. 1978);

Another important question⁴⁴ faced by courts concerns the applicability of the first exception to DR 5-101(B), which states that the withdrawal rule shall not apply "[i]f the testimony will relate solely to an uncontested matter."⁴⁵ One court has directly considered the applicability of this exception and defined it so narrowly that it is negated altogether.⁴⁶ In that case a lawyer was to testify that his client was ready to close a transaction in a timely fashion. Among other things, the lawyer was to be called to testify to the papers in his briefcase at the appointed time of the closing. As no one else had seen the contents of the briefcase, the lawyer was the only possible witness to this information. Nonetheless, the court held that such testimony went far beyond the "uncontested matters" exception because "his testimony on what was in his briefcase . . . was subject to an attack for credibility."⁴⁷ Obviously, if an attack for credibility suffices to remove the testimony from the purview of the exception, the exception is meaningless.

From the client's perspective, perhaps the most striking question that the courts have dealt with is the applicability of the substantial hardship exception, which provides that the withdrawal rule is inapplicable "[a]s to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."⁴⁸ Since the client cannot by choice or waiver avoid the imposition of the rule,⁴⁹ the substantial hardship exception is the only aspect of the rule that runs directly in the client's favor.

It should not come as a surprise by this time that the substantial hardship limitation is strictly construed. In the words of one court:

This exception generally contemplates only an attorney who has some expertise in a specialized area of the law such as patents and

Connell v. Clairrol, Inc., 440 F. Supp 17, 19 (N.D. Ga. 1977); 20 Cal. 3d at 913, 576 P.2d at 973-74, 145 Cal. Rptr. at 11-12; text accompanying notes 96-98 *infra*.

44. One court has also discussed the issue whether a lawyer is a member of a firm when he is "of counsel," holding it a factual question. J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975). And the Los Angeles County Bar Association has opined that a lawyer temporarily on leave from a law firm is a member of the firm for purposes of the withdrawal rule. LOS ANGELES COUNTY BAR ASS'N ETHICS COMM., OPINION No. 367 (1977).

45. DR 5-101(B)(1). A related exception provides that the rule is inapplicable "[i]f the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony." DR 5-101(B)(2). See also DR 5-102.

46. Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977).

47. *Id.*

48. DR 5-101(B)(4).

49. Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977).

the burden on the firm seeking to continue representation to prove distinctiveness. In addition, the distinctive value must be apparent before the decision to accept or refuse employment is made. Accordingly, the Rule is to be very narrowly construed.⁵⁰

One wonders why, if a lawyer has a particular expertise in a specialized area of the law, this distinctive value must be apparent (and to whom) before the decision to accept or refuse employment is made. Apparently, this additional requirement is added to prevent a firm from acquiring information, either legal or factual, during the course of representing a client and as a result becoming so important to the client that the disqualification of the firm would constitute sufficient hardship. In this way, a firm cannot avoid its ethical obligation to resign by citing the expertise it has acquired in representing the client. As a consequence, the client is not protected against losing the investment he has made in his counsel, except in the rare circumstance in which the firm was uniquely qualified to represent the client before it was hired.

While few cases have discussed the hardship exception in depth, the limited applicability of the exception has been established. Although in one recent case, in denying a motion to disqualify based upon the withdrawal rule, the court focused on the cost of replacing in-house corporate counsel in a relatively small action,⁵¹ the general rule is that neither economic hardship suffered by the client,⁵² who must hire a new law firm that must become acquainted with the case, nor emotional or linguistic hardship is sufficient to invoke the exception. Thus, in one case in which a firm had a ten year history of representing plaintiff and had spent 450 hours in connection with plaintiff's case, the court disqualified plaintiff's counsel on the day of the trial.⁵³ In another case an attorney who could speak Rumanian, the only language the client could understand, who had represented plaintiff's family members for many years, and who had great familiarity with representing Rumanians in general, was disqualified.⁵⁴

50. *Id.* at 1068-69 (citation omitted).

51. *Stanwick Corp. v. United States*, No. 77-115 (U.S. Ct. Cl., filed July 14, 1978).

52. *LOS ANGELES COUNTY BAR ASS'N ETHICS COMM.*, *supra* note 44. It might if this cost threatened to bankrupt the client. Compare *FLORIDA BAR ASS'N, ETHICS OPINION 76-26* (1977), with *ABA COMM. ON PROFESSIONAL ETHICS, RECENT ETHICS OPINIONS*, No. 339 (1975).

53. *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486 (S.D.N.Y. 1976). See also *Stagen Realty & Management, Inc. v. Superior Court*, __ Cal. App. 3d __, 151 Cal. Rptr. 742 (1979); *LOS ANGELES COUNTY BAR ASS'N ETHICS COMM.*, *supra* note 44.

54. *Draganescu v. First Nat'l Bank*, 502 F.2d 550 (5th Cir. 1974). The witness in that case was trial cocounsel, but the court did not attach any significance to that fact. In addition, the

Although courts have been stern in their application of the withdrawal rule, they have been lax in precisely specifying its effects. The typical court order does no more than require counsel to withdraw—it neither provides a deadline for such withdrawal⁵⁵ nor specifies the services that can be performed by the withdrawn counsel.⁵⁶ No court has seriously considered the question of an attorney's subsequent involvement either in the case, as a researcher, investigator, negotiator or tactician, or in the client's other affairs, whether or not directly related to the case. Similarly, no court has considered the effect of trial counsel's or the witness' resignation or absence from the firm as a means of curing the dilemma.⁵⁷ The result is that whatever benefit there is in strict enforcement of the rule may be undermined by the continued involvement of a disqualified firm in the affairs of the client.⁵⁸

II. JUSTIFICATIONS

Few courts have closely examined the rationales for the rule. The lengthy history of the rule disqualifying the trial counsel-witness has lent support and color to the very different situation in which the entire firm is disqualified.⁵⁹

attorney, who had accepted the case on a contingency basis, alleged that other lawyers were reluctant to accept such cases on a contingency basis. Nonetheless, his disqualification was held not to be substantial hardship. *Accord*, *Tru-Bite Labs, Inc. v. Ashman*, 54 App. Div. 2d 345, 388 N.Y.S.2d 279 (1976). *But see* MASSACHUSETTS BAR ASS'N COMM. ON ADMINISTRATION OF JUSTICE, SUBCOMM. ON ETHICS, OPINION No. 75-2 (1975) (suggesting that mental condition of client and his emotional dependence on attorney might constitute substantial hardship).

55. *See, e.g.*, *Comden v. Superior Court*, 20 Cal. 3d at 916-18, 576 P.2d at 976-77, 145 Cal. Rptr. at 14-15. *But see* *Norman Norrell, Inc. v. Federated Dep't Stores, Inc.*, 450 F. Supp. 127, 130 (S.D.N.Y. 1978) (ordering firm's disqualification from representation of client at trial only, and specifically allowing disqualified firm to continue pretrial activities, including court appearances, on behalf of client). *See also* MASSACHUSETTS BAR ASS'N COMM. ON ADMINISTRATION OF JUSTICE, SUBCOMM. ON ETHICS, OPINION No. 75-4 (1975) (suggesting that DR 5-102(A) requires withdrawals only from conduct of *trial*, not litigation).

56. *See* *Draganescu v. First Nat'l Bank*, 502 F.2d 550, 552 (5th Cir. 1974) (suggesting that withdrawn counsel can continue to serve as interpreter).

57. The question of a former member of a firm was delicately avoided in *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975). In *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975), the court held that the question whether an attorney who was "of counsel" was "in the firm" was a substantial issue of fact. *See also* LOS ANGELES COUNTY BAR ASS'N ETHICS COMM., *supra* note 44 (holding that temporary leave of absence does not suffice to take attorney out of firm).

58. *See* text accompanying notes 68-72 *infra*.

59. For a discussion of the rationales of the rule as they apply or have historically been applied to the trial counsel-witness, see Enker, *The Rationale of the Rule That Forbids a Lawyer to Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUNDATION RESEARCH J. 455; Sutton, *The Testifying Advocate*, 41 TEX. L. REV. 477 (1963); Whitman, *Comment on Recent Decisions of Courts of Last Resort on Ethical Propriety of a Lawyer Appearing as a Witness in Case in Which He Is Acting as Counsel*, 9 A.B.A.J. 123 (1923); Comment, *The Attorney as Both Advocate and Witness*, 4 CREIGHTON L. REV. 128 (1970); Note, *The Ethical Propriety of an Attorney's Testifying*

The ABA Code gives four interrelated reasons for the withdrawal rule:

- (1) If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness.
- (2) Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case.
- (3) An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility.
- (4) The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.⁶⁰

In addition to the four rationales set forth above, courts have interpreted the rule in conjunction with canon 9 of the ABA Code, which provides that "A Lawyer Should Avoid Even The Appearance Of Professional Impropriety."⁶¹

The cornerstone of the rationales presented in the Code is the assertion that the roles of advocate and witness are inconsistent. In the words of the Code, "the function of an advocate is to advance or argue the cause of another."⁶² Yet this is an inaccurate description of attorneys, except, perhaps, litigators at trial. While the words "advocate" and "witness" are rarely used to describe activities outside the litigation context, an attorney representing a client in a negotiation, for example, or in planning a transaction may serve as both representative and prospective witness. This is because the planning attorney should create facts beneficial to his client and state (or more precisely, augment) his client's cause by, for example, discovering a beneficial fact or creating a beneficial contractual provision. At the same time, the attorney should arrange for the preservation of beneficial facts, as by placing himself in an advantageous position to see or hear something.⁶³

in Behalf of His Own Client, 38 IOWA L. REV. 139 (1952); Note, *The Advocate-Witness Rule: If Z, Then X, But Why?*, 52 N.Y.U.L. REV. 1365 (1977); Comment, *The Rule Prohibiting an Attorney from Testifying at a Client's Trial: An Ethical Paradox*, 45 U. CIN. L. REV. 268 (1976).

60. EC 5-9 (numerals added). Three of these reasons assume that the attorney will be a witness on behalf of his client, rather than in opposition to his client.

61. See *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975); *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486, 488 (S.D.N.Y. 1976); *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1354 (D. Colo. 1976); 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.

62. EC 5-9; see *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486 (S.D.N.Y. 1976).

63. Thus, while representing the Comdens, Greene placed himself in a position to hear allegedly damaging statements made by his client's potential adversaries. 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.

The function of preserving beneficial facts can often be accomplished most simply by a writing, a letter or a contract; and it is often part of an attorney's responsibility to create that writing, and to do so in the most advantageous way for his client. As a result, the attorney may be a witness to the content of that writing, to its intent, to its delivery, or to any reaction to it. Of course, an attorney may also perform this evidence-creating function by attending meetings, or by investigation.

Thus an attorney's role as potential witness is often part of his role as his client's representative. It may be as important as the deal he makes or the contract he drafts, since without his testimony (or the threat of his testimony) the client's position may be weakened or defeated. To expect that the intertwined role of representative and witness will or even can untangle when the matter reaches litigation, so that the attorney can serve as a witness as defined in the Code—to present the facts objectively without any professional interest—is oversimplistic. The attorney fashioned the facts so that as a witness he could objectively put forward his client's (or even ex-client's) position; that is, he structured the situation so that he would be an objective advocate.⁶⁵ His client's case and his reputation may still depend on how well he performed that transactional function.

Once this distinction between advocate and witness is impeached, the rationales for the withdrawal rule lose much of their support. The first rationale for the rule presented in the ethical considerations is that "[i]f a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness."⁶⁴ This potential danger is certainly diminished when the attorney-witness himself is not trial counsel but only a member of trial counsel's firm.⁶⁵ Of course, "the opportunity still exists for opposing counsel to argue that the attorney-witness' stake in the litigation as a member of his law firm influences his objectivity";⁶⁶ the disqualified firm's attorney is still eligible to be a witness,⁶⁷ and his impeachability for interest is not

64. EC 5-9. This rationale was cited prominently in both *Comden v. Superior Court*, 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11, and *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486, 489 (S.D.N.Y. 1976).

65. *Comden v. Superior Court*, 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.

66. *Id.*

67. If the question is simply the effectiveness of the attorney as a witness, the client should be the one to make the choice, unless some injury to the judicial process is involved. See *id.* at 918, 576 P.2d at 977, 145 Cal. Rptr. at 15 (Manuel, J., dissenting).

likely to evaporate with his firm's withdrawal from the case. For example, in *Comden*, Loeb & Loeb was disqualified because Marvin Greene ought to be called as a witness. If the case goes to trial and Greene is a witness, he may be impeachable for the following reasons,⁶⁸ all related to his law firm's representation of Comden: (1) the statements that he witnessed occurred during his representation of Comden; (2) as an exercise of his professional judgment, which he (and his firm) would like to see proved correct, he advised Comden to take her present course of action, that is, to file suit; (3) he and his firm still represent Comden in several other related matters; (4) as part of their representation of Comden, he and his firm are still offering suggestions on the handling of this case; and (5) his firm anticipates further payment from the Comdens. Other possible grounds for impeachment, relating to the firm's prior representation, are suggested by the facts of other cases. Perhaps the most devastating to the witness would be that his firm still has a contingent fee riding on the outcome of the case,⁶⁹ or expects a bonus or further business if the transaction that is the subject of the litigation ultimately proves successful.⁷⁰ Or it may be simply that the party previously represented still owes the firm money. In other instances, the attorney-witness might be a legal, business or investment partner of the litigant, or might represent other parties, coplaintiffs or codefendants, in the same case.⁷¹

The fact is that witnesses who at one time represented a litigant are likely to be impeachable for interest for any number of reasons, and forcing their firm to resign from the particular case is not likely to resurrect their credibility. Nor is the rule drafted to achieve this purpose, since it eliminates only one area of impeachment of the testifying attorney—his firm's present representation of the litigant at the trial—and allows the continued involvement of the firm both in the client's affairs that are the subject of the lawsuit and in the client's other business.⁷²

68. Whether, as a matter of the law of evidence, factors of this sort are admissible, we do not here fully explore.

69. See *Draganescu v. First Nat'l Bank*, 502 F.2d 550, 552 (5th Cir. 1974); *Fracasse v. Brent*, 6 Cal. 3d 784, 786, 494 P.2d 9, 10, 100 Cal. Rptr. 385, 386 (1977); *Heinzman v. Fine, Fine, Legum & Fine*, 217 Va. 958, 960, 234 S.E.2d 282, 283 (1977).

70. See *Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064, 1067 n.3 (N.D. Tex. 1977).

71. See *Kroungold v. Triester*, 521 F.2d 763, 764 (3d Cir. 1975); *Harrison v. Keystone Coca-Cola Bottling Co.*, 428 F. Supp. 149, 151-52 (M.D. Pa. 1977).

72. The rule is not applicable, for example, if the firm is other than trial counsel, although the witness would be equally impeachable. See *Nakasian v. Incontrade, Inc.*, 78 F.R.D. 229, 232 n.3 (S.D.N.Y. 1978).

The second rationale for the rule set forth in the ethical considerations is that the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case.⁷³ This argument, too, loses most, if not all, of its force when the witness is not trial counsel but only a member of trial counsel's firm. As the dissent in *Comden* pointed out:

[I]f the reason underlying disqualification is primarily opposing counsel's difficulty in cross-examining a colleague, surely this handicap will exist whether Loeb and Loeb remains as the representing law firm or is suspended. . . . Defendants have shown no more detriment will occur if petitioners are at that point represented by Loeb and Loeb, than if some other attorney is substituted in. Whatever hesitancy their counsel may have in the cross-examination of a professional colleague will be present in equal force no matter who represents the plaintiff Comdens.⁷⁴

The third rationale presented in support of the withdrawal rule is the unseemly and ineffective position of an advocate who must argue his own credibility.⁷⁵ Yet again, it is not the advocate-trial counsel arguing his own credibility, but a member of the trial counsel's firm. If, as the rule states, the witness cannot effectively argue his credibility, the disqualification of his firm would seem a proper matter of trial tactics rather than ethics. In making the tactical decision the factors to be weighed should include the import to the client of the law firm, the necessity of the lawyer's testimony, and the detriment to that testimony caused by the lawyer's position within trial counsel's firm.

This issue of unseemliness is closely related, or identical, to the last rationale for the withdrawal rule:

[T]he possibility [exists] that testimony by an attorney in the case may lead the public to think "that lawyers may as witnesses distort the truth," thereby diminishing the public's respect for and confidence in the profession. Where doubt may becloud the public's view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to ensure that the standards of ethics remain high.⁷⁶

73. See *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975); *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486, 489 n.4 (S.D.N.Y. 1976).

74. 20 Cal. 3d at 918-19, 576 P.2d at 977, 145 Cal. Rptr. at 15 (Manuel, J., dissenting). See also *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1353 (D. Colo. 1976) (pointing out that ethical duty to represent client competently and zealously easily outweighs professional hesitancy in cross-examining colleague).

75. See *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486, 489 (S.D.N.Y. 1976).

76. *Id.* at 489; see *Comden v. Superior Court*, 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal.

The argument that the public's respect for and confidence in lawyers may be diminished by its view of the testifying advocate is grounded principally in two commonly presented fictions, both of which are reiterated in the Code: witnesses are supposed to be neutral observers of fact; and lawyers should avoid being witnesses because the role of a lawyer and that of a witness are antithetical.⁷⁷ The first of these is long discredited. American courts permit and even encourage partisans to be witnesses and allow the impeachment of witnesses, with the expectation that the judge or jury will evaluate the testimony in the light of the witnesses' interest.⁷⁸ The second fiction is, as already explained, equally fallacious—the attorney's role may in part be to make himself a witness.

What is unseemly, then, is the Code's sanctification of these fictions as part of the lawyer's ethics. What is likely to reduce public confidence in lawyers and legal ethics is the rule's existence, because it emphasizes the impeachability and even the untrustworthiness of lawyers' testimony, and because it calls for enforcement, which is no more than a public display that lawyers do not abide by their own ethical code.⁷⁹ Thus the rule is self-perpetuating: it is unseemly for an attorney whose firm is trial counsel in the case to testify *because* there is a rule of ethics to the contrary.

III. THE CLIENT

The withdrawal rule makes no distinction between various clients. At least as it is written and has been interpreted, the rule applies equally to all clients. No client, no matter how sophisticated, can waive

Rptr. at 11. In this regard, however, the court in both *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975), and *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348 (D. Colo. 1976), warned against taking the view of the most cynical as the voice of the public. 527 F.2d at 1294; 421 F. Supp. at 1353. Although the court in *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486 (S.D.N.Y. 1976), found this to be the most persuasive rationale for the disqualification, at least in a nonjury case, it did not suggest what member of the public would lower his estimation of lawyers. 423 F. Supp. at 489-90. It seems that the client, as the member of the public with the most at stake, is likely to be offended that he cannot waive the withdrawal rule, but rather must make his own sacrifices for the public relations of the legal profession.

77. EC 5-9.

78. See *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1354 (D. Colo. 1976).

79. This is not to suggest that violations of the ethical code should go unpunished. When rules of ethics are unnecessary to protect the client or the profession, however, there is no purpose in enforcing them except for discipline's sake.

application of the rule.⁸⁰ Because the rule focuses on the lawyer, it misses what may be important distinctions between clients. Clients are different in a number of ways that may require different analyses of the rule. Some clients seek the services of a lawyer only for a particular matter in a crisis situation. This is the customary situation with middle to low income persons who see a lawyer only when faced with an immediate legal problem, usually in the litigation context, often because they have been involved in a tort or have been arrested. Usually no great harm to the client results if the lawyer first selected declines the representation.⁸¹ As long as there are a sufficient numbers of lawyers in the community, another may be found. Yet even in these situations, when the attorney has no pre-existing relationship with the client, and the client seeks legal help only with a particular litigation matter, a shift of lawyers is likely to be disquieting to the client. The lawyer who has investigated with the client the factual circumstances of the case, who has begun to communicate effectively with the client, and who has gained the client's confidence must be replaced by a stranger.⁸² Another problem that may be caused by disqualification is the disruption of the fee arrangement. In contingent fee situations, some split of the contingency, or other formula, may be used to determine the compensation of successive lawyers.⁸³ The first lawyer is certainly entitled to some recovery, whether measured by quantum meruit or another theory, if he did substantial work before it became apparent that he ought to be a witness.⁸⁴ As a result it may be difficult, or at least costly, to find subsequent counsel.⁸⁵

80. The one exception to this is an attorney-litigant who represents himself *pro se*, or who has his own firm represent him. See text accompanying note 87 *infra*.

81. The client's statements to the attorney, even though the engagement does not materialize, are protected by confidentiality, so the client is not prejudiced.

82. To some people unaccustomed to dealing with lawyers, hiring a lawyer is traumatic; and being forced to repeat the process may mean more than recurring trauma, it may cause the client to forsake his claim.

83. In some instances, a dispute may arise concerning the issue whether the disqualification was foreseeable and thus whether the lawyer was at fault. A lawyer at fault would not be entitled to share.

84. *Fracasse v. Brent*, 6 Cal. 3d 784, 791, 494 P.2d 9, 14, 100 Cal. Rptr. 385, 390 (1972).

85. *E.g.*, *Draganescu v. First Nat'l Bank*, 502 F.2d 550, 552 (5th Cir. 1974) (client's language barrier created difficulty in retaining subsequent counsel); *cf.* *Stanwick Corp. v. United States*, No. 77-115 (U.S. Ct. Cl., filed July 14, 1978) (corporate counsel not disqualified; additional expense of employing outside counsel not justified). This problem may be heightened because lawyers who take cases on a contingency often do so partly because of the likelihood of settling at an early stage in the proceedings. A lawyer, of course, cannot withdraw if the matter does not settle profitably. DR 2-110. Ironically, only a forced resignation might make the situation profitable, or at least less costly for the disqualified lawyer who took the case expecting to turn a profit on a settlement only to find a settlement unobtainable.

The client such as the typical entrepreneur who approaches a lawyer seeking broad-based representation presents different problems. This client is most interested in developing a lasting relationship with the attorney. He sees the attorney's function as a general problem solver, rather than as an advocate in a particular situation. He is likely to keep the attorney on retainer, so that the attorney will be knowledgeable about his affairs and available both for day-to-day matters and whenever an emergency arises. Since he is likely to view his relationship with his attorney as a business investment, the firm's disqualification, even for a particular case, may not only be costly in the particular case, but may destroy or damage an important business asset. When the firm is disqualified, or resigns, the client may start over again with a new firm or, more likely, retain the disqualified firm as his firm for other matters and even, to the extent allowed, as a consultant with respect to the case on which the firm member will be a witness.⁸⁶

Perhaps the most interesting dilemma is when the client and lawyer are identical or, like Siamese twins, inseparable. One such problem is the lawyer who represents himself. To some extent, the rationale of preserving the integrity and unimpeachability of lawyers applies more strongly to the lawyer representing himself, since he is more impeachable for interest, and therefore potentially more embarrassing to the profession, than the lawyer who is a witness to the affairs of a client. At least one case has held, however, that a lawyer who is a party and ought to testify may be represented by his own firm.⁸⁷

A more important situation in which lawyer and client are identical occurs in the cases of corporate counsel and government law offices. While the rule is applicable to such situations, the purposes of the rule are not served by preventing corporate counsel or government law offices from being involved in litigation. In spite of withdrawal, corporate counsel is likely to be intimately involved with the trial process, and the witness is likely to remain impeachable for interest because he is the agent of (and his personal livelihood is dependent upon) the client. Thus, the result of the disqualification of corporate counsel is to

86. This was the case in *Comden*. 20 Cal. 3d at 916, 576 P.2d at 976, 145 Cal. Rptr. at 14 (Manuel, J., dissenting).

87. *Harrison v. Keystone Coca-Cola Bottling Co.*, 428 F. Supp. 149 (M.D. Pa. 1977); VIRGINIA STATE BAR, LEGAL ETHICS INFORMAL OPINION NO. 114; NEW YORK STATE BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINION NO. 353 (1974). In *Harrison*, the court disqualified the firm involved from representing a codefendant; thus the court's decision resulted in both the impeachment of an interested lawyer and the cost to one client of replacing that same lawyer. The court did not investigate how much more impeachable the lawyer-witness would have been if his firm had been allowed to continue its representation of its partner's codefendant.

require the corporation to incur the expense of having outside counsel without protecting the client or the judicial process.⁸⁸

In this era of the taxpayer's revolt, it is perhaps more shocking that government firms, such as district attorneys, have been disqualified under the rule if a lawyer in the office ought to be a witness in a trial.⁸⁹ The expense involved in disqualifying government offices involved with criminal matters, while certainly substantial, may be exceeded by the cost of the disqualification of government civil law offices. Since these offices often negotiate agreements as well as handle any ensuing litigation, the rule will apply in a large percentage of such an office's litigation. While such agencies may try to avoid the application of the rule in the future by dividing into a nonlitigation and a litigation firm, this nominal change in structure will either be disregarded by courts or expose how flimsy are the rule's underlying rationales.

IV. THE LAWYER AND THE LAWYERING PROCESS BEFORE LITIGATION IS CONTEMPLATED

The withdrawal rule by its terms does not apply until there is contemplated or pending litigation. Nonetheless, the rule may have a profound effect on the lawyer and the lawyering process before a dispute arises. This, in part, is because much, if not most, predispute lawyering anticipates some dispute resolution machinery, whether arbitration⁹⁰ or trial. The lawyer structures the client's affairs so that, if necessary, a court or other dispute resolver will vindicate his client. Because, in this sense, the lawyer always contemplates the possibility of litigation, he must consider the effect of the rule if litigation develops.

88. Partly for this reason, the court in *Stanwick Corp. v. United States*, No. 77-115 (U.S. Ct. Cl., filed July 14, 1978), did not require withdrawal, although the court implied that in appropriate circumstances, such as when the additional expense would be more defensible, corporate counsel might be disqualified from acting as trial counsel. See *Norman Norrell, Inc. v. Federated Dep't Stores, Inc.*, 450 F. Supp. 127, 130 (S.D.N.Y. 1978). But see *Gasoline Expressway, Inc. v. Sun Oil Co.*, — App. Div. 2d —, 407 N.Y.S.2d 64 (1978); FLORIDA BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINION NO. 76-26 (1977) (rule applied when attorney was stockholder, vice president and attorney for corporation); LOS ANGELES COUNTY BAR ASS'N ETHICS COMM., *supra* note 44.

89. See *People v. Superior Court*, 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977); *People v. Lopez*, 79 Cal. App. 3d 963, 145 Cal. Rptr. 294 (1978) (withdrawn from publication by order of court); Letter from Albert Bell, Counsel, Ohio State Bar Association, to John J. Adams, Law Director, City of Kettering (March 20, 1978). That the attorney testified may not prevent defendant from obtaining a fair trial. *People v. Guerreno*, 47 Cal. App. 3d 441, 120 Cal. Rptr. 732 (1975); *State v. Johnson*, 224 Kan. 466, 580 P.2d 1339 (1978); *Harris v. State*, 78 Wis. 2d 357, 254 N.W.2d 291 (1977).

90. The rule does not on its face apply to administrative proceedings or to arbitrations, except perhaps to the extent that litigation following the proceedings is contemplated. If the major purpose of the rule is to protect the image of lawyers by relieving them from one area of impeachment, the rule would seem equally applicable to such proceedings.

Without the rule, for example, the lawyer may worry about the effect of writing a demand letter or making a demand. With the rule, the lawyer also needs to evaluate the legal, tactical and extra-legal effect of writing the letter or attending the meeting. The legal effect of the rule is the resulting disqualification of the firm if the rule is applicable. The tactical effect of the rule, which we will investigate later, is simply the disadvantage of raising an issue of the applicability of the rule in any subsequent litigation. The extra-legal effect of the rule is its impact on the ability of the firm, and of lawyers in general, to render good, cost-efficient legal services to the client. This evaluation of the extra-legal impact of the rule must necessarily take into account the value of the firm's general representation of the client, the detriment to the client of the firm's disqualification from the particular litigation, and the impact of and harm to the attorney-client relationship. While the impact of the rule in particular situations is unclear, its impact on the predispute lawyering process is unmistakable. One court identified the hardship to the client who later becomes embroiled in litigation in the following way:

One reason for maintaining a continuing relationship with a lawyer or law firm is to prevent the difficulty which would ensue if each time litigation was commenced a new attorney would be required to familiarize himself with the client and its business. The advantages of preventive law, like preventive medicine, is [*sic*] well recognized through this profession as a means of settling business problems before they require expensive and time-consuming litigation. A client who desires to head off a court battle should not be penalized for having the foresight to employ legal counsel before the commencement of a lawsuit. Requiring a litigant to change counsel when a suit is filed surely causes some degree of hardship.⁹¹

As the rule comes to be more frequently applied by courts and followed by practitioners of their own volition, the advantages of seeking legal help for incipient transactions may be reduced. Indeed, clients with a

91. *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1352 (D. Colo. 1976). See also *Comden v. Superior Court*, 20 Cal. 3d at 916, 576 P.2d at 976, 145 Cal. Rptr. at 14. Some may urge that when litigation results, the preventive law performance of the lawyer was inadequate, so that substitution of counsel does not harm the preventive law concept. Preventive law lawyering does endeavor to maximize legal opportunities and also to minimize the risk of later legal trouble, but it does not necessarily fail if litigation results. In transactional and other nonadversarial matters predictable trouble can often be eliminated, but at the cost of giving up too much at early preventive law stages. For example, an ambiguous contract may lead to foreseeable litigation. That litigation could have been avoided by an unambiguously worded contract, but the cost of clarity may be greater than the cost of litigation. See generally L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1978) (especially chs. 6 and 7).

particularly valuable relationship with their attorneys may be advised to carefully limit the attorneys' roles in such transactions.

A more subtle but perhaps more harmful effect of the rule is its impact on the lawyering ability of a preventive lawyer. The rule not only interferes with the attorney-client relationship but impairs one of the preventive lawyer's most useful techniques, making himself an administrator-witness who enforces or maximizes his client's rights. When possible, the preventive lawyer wants to perceive the contractual breach, or to investigate the tort. He does so not only because he can do it better than the client, but because it puts him in a better position to negotiate a settlement, since he can gauge more precisely the strength of his client's prospective case if litigated, and since he can ensure that his client will have a good witness. And, contrary to popular belief, the lawyer often makes a very good witness, not because of his courtroom manner, however good or bad, but because the lawyer knows *what* to witness.

Once the lawyer-client relationship is established, the harm inherent in the withdrawal rule becomes more apparent (but not necessarily more real) as the transaction moves closer and closer toward litigation. As litigation looms nearer it becomes more likely that counsel will, in fact, resign or be disqualified from the litigation if a member of his firm is a witness. As a result, counsel must become increasingly circumspect about how his firm is involved, and what it witnesses, in the course of representation.

In the future a lawyer may refuse to engage in settlement negotiations⁹² or factual investigations because of the possibility that, as a result of his participation, he might become a witness and thereby at a minimum give his opponent a new tactical weapon in any ensuing litigation. As a result, settlement negotiation might not take place, or the lawyer might abdicate some of his traditional functions by having a nonlawyer (often the client) conduct settlement discussions and factual investigations to insulate the firm from the application of the rule. Thus the rule, by interfering with the lawyer-client relationship, by limiting the usefulness of legal planning in the early stages of a transaction, by interfering with the techniques used by preventive lawyers, and by encouraging nonlawyers to succeed to functions traditionally performed by lawyers, would often result in poorer representation, and

92. As is evident from the *Comden* case, the possibility of disqualification is not cured just because settlement negotiations may be privileged. 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.

ironically might deter a settlement that would, among other things, have avoided the application of the rule.⁹³

V. THE LITIGATION CONTEXT

While the rule has an impact on lawyering even before there is a dispute, and a firm may have to withdraw from or decline representation as soon as litigation is contemplated, the initiation of litigation remains the crucial step in the application of the withdrawal rule. Not until a suit has been filed does a court have the right to apply the rule by requiring disqualification. Because from the moment of the filing of the suit the court process anticipates the eventual trial, it seems logical that the rule may require disqualification of a firm as soon as suit is filed.⁹⁴ But because the rule is aimed only at preventing an attorney from testifying, which can occur only at trial, and since relatively few cases, once filed, proceed to a trial on the merits, enforcing the rule as soon as suit is filed results in unnecessary disqualification, and thus inconvenience and expense, in a great number of cases.⁹⁵

Because the rule is applicable and the court, as enforcer, is present, the tactical value of the rule flowers when a dispute enters the litigation context, a fact that has not been ignored by courts. As the court noted in *Comden*: "It would be naive not to recognize that the motion to disqualify opposing counsel is frequently a tactical device to delay litigation."⁹⁶ But while the courts have not been blind to the tactical value of the rule, neither have they fully considered it. Even in the most usual circumstances, the tactical use of the rule may be more varied than just to delay the litigation. There may be tremendous advantage

93. We do not mean to imply that the rule itself fosters litigation. By being a tactical weapon, it may favor one side or the other, but this can be taken into account in reaching a settlement. But to the extent that it results in nonlawyers drafting documents and deters lawyers, skilled negotiators, from engaging in settlement discussions, it is likely to increase litigation.

94. *Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064 (N.D. Tex. 1977), required attorneys "to notify court as soon as it appears that they or members of their firms have any testimony that *could conceivably* be used at trial." *Id.* at 1069 (emphasis in original).

95. This unnecessary expense could be avoided, at least in part, by adopting the approach of the court in *Norman Norrell, Inc. v. Federated Dep't Stores, Inc.*, 450 F. Supp. 127 (S.D.N.Y. 1978), which did not require withdrawal of the disqualified firm until trial. This result, while certainly preferable to early disqualification, may seriously affect settlement, even if the case does not go to trial, by giving the disqualified firm's adversary a decided edge because late disqualification itself may be prejudicial or at least detrimental to the client. See *Miller Elec. Constr., Inc. v. Devine Lighting Co.*, 421 F. Supp. 1020, 1023 (W.D. Pa. 1976).

96. 20 Cal. 3d at 915, 576 P.2d at 975, 145 Cal. Rptr. at 13; see *Connell v. Clairol, Inc.*, 440 F. Supp. 17, 19 (N.D. Ga. 1977).

in disqualifying the opposing counsel. As indicated, in some circumstances new counsel may be unobtainable. In other cases, the expense incurred in hiring new counsel may be significant, even if not a "substantial hardship." Even when the motion will eventually be lost, there may be an economic incentive to make a disqualification motion because the cost to the opponent of waging the battle may be quite large—in one case the designation of record for the motion alone contained nearly 1,000 pages.⁹⁷ In addition, while an opponent's attention is focused on the motion, action on the merits may be delayed.⁹⁸ Thus a party might use the motion to control the tempo of a lawsuit. The existence of the rule also may open the scope of discovery to permit, or even require, discovery centered on whether the attorney ought to be a witness. Further, because delaying decision on a disqualification motion may increase the prejudice to the client, this discovery might properly be expedited in some circumstances. Discovery, of course, would be a perfect vehicle for harassing the opposing firm by taking depositions of all attorneys involved, in the hope of discovering at least one potential witness. In other circumstances, attorneys may wish to avoid disqualification of their counterparts. The reasons for this may range from a particularly good working relationship to the hope that the attorney-witness will be more easily impeached, and thus his testimony rendered less harmful.⁹⁹

While the trial court has the authority to raise the applicability of the rule on its own motion,¹⁰⁰ it will rarely be in a position to do so unless the attorney testifies, submits an affidavit, or is listed as a potential witness at the pretrial, or unless the issue is otherwise brought to the court's attention. Thus, while it may be an attorney's ethical duty

97. *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1351 (D. Colo. 1976). In a modest effort to ascertain data about the costs involved, we requested information from some lawyers involved in reported cases. The replies we received are that cost of the motion was: "\$10,000"; "\$9,000"; "difficult to segregate"; "difficult to quantify—estimate \$3,500"; "twenty to thirty hours"; "with appeal \$10,000"; "approximately \$3,045, including the appeal"; "not available"; "\$3,500 plus the cost of the transcript of my testimony, which was probably five or six hundred dollars."

98. *See Miller Elec. Constr., Inc. v. Devine Lighting Co.*, 421 F. Supp. 1020, 1023 (W.D. Pa. 1976). For this reason, the firm that successfully fought a motion to disqualify in *Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348 (D. Colo. 1976), advised its client to hire new counsel rather than delay trial on the merits to await the outcome of the appeal of the disqualification motion. Note, *The Advocate-Witness Rule: If Z, Then X, But Why?*, *supra* note 59, at 1380 n.88.

99. *See Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064, 1067 (N.D. Tex. 1977).

100. *Id.* at 1067; *Stagen Realty & Management, Inc. v. Superior Court*, — Cal. App. 3d —, 151 Cal. Rptr. 742 (1979).

to bring to the attention of the court possible violations of the Code of Professional Responsibility, an attorney may intentionally overlook the applicability of the rule or may attempt to agree with opposing counsel not to raise the issue in exchange for some concession.¹⁰¹

The more the rule is used as a tactical device, the greater the cost both to the client and to the judicial system. While the cost of the rule to the client may seem paramount, the cost to the judicial system should not be ignored. Because, like other procedural matters, the disqualification motion is collateral to the core of the dispute between the litigating parties, bringing the motion is unlikely to bring the litigation to a halt, or to reduce the expense or complexity of the litigation process, although responding to a disqualification may consume much judicial time and energy. Even when the motion is successful and a firm is forced to resign, the case continues. Indeed, the added cost and delay incurred while the new attorneys become acquainted with the action may significantly increase a court's burden.¹⁰²

VI. SUGGESTIONS

In sum, the withdrawal rule does not serve the client, the lawyer or the judicial process. The rationales for the rule are flimsy even when applied to the nondifferentiated client and attorney relationship. Applied to the myriad of different attorney-client relationships, the rule is often counter-productive because it interferes with the lawyer-client relationship, with lawyering and with the judicial process, and does so unnecessarily in the vast majority of situations that do not result in a trial. The rule is presented as a matter of ethics, rather than economics, and therefore does not purport to be practical. Courts and legislatures have accepted and implemented it without scrutinizing either the rationales that supposedly underlie it, or any empirical data showing that the rule is important to the standing or reputation of the profession. In this sense, enforcing the rule to protect the "public trust within the scrupulous administration of justice and in the integrity of the bar"¹⁰³ may be a pyrrhic triumph.

101. *See, e.g.,* *United States v. McKoy*, 448 F. Supp. 826 (E.D. Pa. 1978).

102. *See* *Ross v. Great Atl. & Pac. Tea Co.*, 447 F. Supp. 406 (S.D.N.Y. 1978) (court noted delay and congestion that would result if counsel were disqualified).

103. *Comden v. Superior Court*, 20 Cal. 3d at 915, 576 P.2d at 975, 145 Cal. Rptr. at 13 (quoting *Hull v. Cellanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975)); *see* *Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064, 1068 (N.D. Tex. 1977).

At least in California, the rule has been the subject of much discussion since the *Comden* decision. The California State Bar has recently proposed amending the California version of the rule to, among other things, eliminate the effects of the *Comden* decision by making the rule inapplicable to law firms as distinguished from individual lawyers in a firm. This approach avoids the difficulties of the rule's application to various clients at various times, as well as the difficulties inherent in applying ethical standards in the context of ongoing litigation to which any ethical violation is collateral. Consequently, this approach would avoid most tactical applications of the proposed rule and the concomitant impact on practice.¹⁰⁴

If there is unethical conduct, in the true as well as the codified sense, then the attorney rather than the client should directly bear the consequences. A bar disciplinary hearing is a more equitable forum to mete sanctions upon the attorney than is the court of the ongoing litigation.

Although we believe that the revocation of the rule is appropriate, we recommend that in practice a lawyer inform his client in as much detail as possible about the detriment of continuing representation when a member of the firm will¹⁰⁵ or may testify, so that the client can determine if the continued representation would be beneficial. Obviously the less sophisticated the client, the more detailed should be the lawyer's explanation, and the more the lawyer should suggest that the client consult independent counsel on this question alone. With certain clients who are or contain their own legal staffs, such as corporate counsel, asking the question may suffice to answer it.

The question of the testifying firm member should be considered one of attorney competence and attorney-client relations. Thus, rather than appearing under canon 5, which is aimed principally at conflicts of interest, the requirement that a lawyer inform a client of the effects of his continued representation if a firm member may be a witness might appropriately appear as a corollary to canon 6 of the Code,

104. The previous proposal made the client's consent to a firm's continued representation a subject before the court, and as a result entailed continued judicial involvement in the applicability of the rule and in such issues as the substance and understanding of the client's waiver. Report and Recommendations of the State Bar of California Board of Governors Committee on Lawyer's Services, Appendix B, Proposed Amendments to the Rules of Professional Conduct, Rule 2-111(A)(4) (December 28, 1978).

105. Here, since the attorney and client rather than the court are determining who will testify, the question can be actual rather than speculative.

which provides that "A Lawyer Should Represent A Client Competently." Explaining the detriment of one's firm's continued representation is one aspect of competent representation, just as declining employment when one's particular legal skills are deficient is an aspect of competent representation.¹⁰⁶ This should eliminate the use of the rule as a tactical weapon; it should also reduce the enormous costs of the rule, both direct and indirect, not only in the planning stages of a transaction, but in all stages of the litigation.

We have in the past criticized the Code because of its unresponsiveness to preventive practices.¹⁰⁷ We see the rule as another illustration of a system of ethics that ignores the *sine qua non* of the legal profession—the client¹⁰⁸—and speaks, out of habit, of legal practice as courtroom practice. While the rule is indeed harmful to the profession and, we believe, to public confidence in the profession, the Code's failure to portray accurately lawyers and the practice of law, and its perpetration and public espousal of myths, such as the inconsistency of being both advocate and witness, may ultimately prove even more harmful. The Code should be reexamined and rewritten so that legal ethics as codified serve the public and client, in the general rather than the specific sense, and reflect—indeed, if possible, enhance—the myriad ways in which the modern lawyer serves the client and society.¹⁰⁹

106. DR 6-101(A)(1). Competent representation may include more than this one instance of informed participation by a client. We believe that the Code has distorted the proper attorney-client relationship in the planning context and minimized the role of the client. See Brown & Brown, *What Counsels the Counselor, The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U.L. REV. 453 (1976).

107. See Brown & Brown, *supra* note 106.

108. A voice in the wilderness, *Stanwick Corp. v. United States*, No. 77-115 (U.S. Ct. Cl., filed July 14, 1978), states clearly that, in the opinion of that court, the rule is for the benefit of the client. This contrasts with the prevalent view, at least in reported opinions, that the rule exists for the protection of the bar and of the integrity of the court, as well as for the clients. See, e.g., *Supreme Beef Processors, Inc. v. American Consumer Indus., Inc.*, 441 F. Supp. 1064, 1068 (N.D. Tex. 1977). In our opinion, that philosophical approach, more than any substantive distinction (although there were some), explains why that court construed the rule more liberally than other courts, and refused to disqualify counsel.

109. See Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 646 (1978) ("lawyers as a profession are uniquely insulated from the normal workings of the political process").

